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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, *et al.*,

Petitioners,

v.

DONALD MATTHEWS, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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Interest of *Amicus*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society.

The N.A.A.C.P. Legal Defense and Educational Fund, Inc. is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts in cases involving many facets of the law.

Attorneys for the Legal Defense Fund have handled many cases involving Title VII of the Civil Rights Act of 1964 and other problems of racial discrimination. Among these are three cases in this Court regarding awards of counsel fees in civil rights litigation. *Newman* v. *Piggie Park Enterprises,* 309 U.S. 400 (1968); *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696 (1974); *Northcross* v. *Board of Education,* 412 U.S. 427 (1973).

ARGUMENT

For the reasons set forth in the Brief for Petitioners in *Fitzpatrick* v. *Bitzer,* No. 75-251, pp. 40-61, *amicus* maintains that Congress has the authority under section 5 of the Fourteenth Amendment to render a state liable to suit in federal court for monetary or other relief, and that Title VII of the 1964 Civil Rights Act, insofar as it authorizes awards of back pay and counsel fees against a state, is therefore constitutional. Even in the absence of that authority, or of a statute expressly authorizing awards of counsel fees against a state, we urge that such awards are incidental to actions against state officials for injunctive or declaratory relief and thus fall within the exception the Eleventh Amendment articulated in *Ex Parte Young,* 209 U.S. 123 (1908).

Although the state of Connecticut is not a formal party to this action, it does not claim that it is a stranger to this

litigation against whom no relief could run for want of notice or hearing. When this action was commenced against the individual defendants the state could have refused to become involved in the case, leaving the defendants to fend for themselves and defend it, or offer judgment, as they pleased. Instead, from the moment this action was filed, the state chose to assume complete control over the defense, receiving and serving all papers, negotiating with the plaintiffs, and making all substantive and tactical decisions. Mr. Bitzer, although the named defendant, has never participated in the litigation or retained his own counsel. The state sought to win in this case a judgment that would bar relief for the named plaintiffs and, by reason of collateral estoppel or *stare decisis,* effectively preclude similar actions by other plaintiffs against other state officials or the state itself. The state has availed itself of all legal procedures it wished to advance its views; if costs were awarded in this action against the plaintiffs, that money would go, not into Mr. Bitzer's pocket, but into the state treasury.

The state cannot inject itself into this litigation, seizing control of the defense and seeking all the fruits of a legal victory, and yet avoid the normal responsibilities and liabilities of a litigant. A non-party who has an interest in the outcome of litigation and who fully participates therein is normally deemed liable to judgment just as if he were a formal party. *Souffront* v. *Compagnie des Suceries,* 217 U.S. 475, 486-87 (1910)[1] "[O]ne who prosecutes or defends a suit in the name of another, to establish and protect his own right, or who assists in the prosecution or defense of an

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[1] *Dick Press Guard Mfg. Co.* v. *Bowen,* 229 F. 193, 196 (N.D. N.Y.), *aff'd,* 229 F. 575 (2d Cir.) *cert. denied,* 241 U.S. 671 (1915); *Ocean Accident & Guarantee Corp.* v. *Felgemaker,* 143 F.2d 950, 952 (6th Cir. 1944); *Eagle Mfg. Co.* v. *Miller,* 41 F. 351, 357 (S.D. Iowa 1890).

action in aid of some interest of his own, and who does so openly, to the knowledge of the opposing party, is as much bound by the judgment, . . . as he would be if he had been a party to the record." A state may elect to stand aloof from litigation against an official and to thus preserve intact any immunity it may enjoy; but if it chooses to join in the litigation and to seek to win and enjoy the benefits of a successful defense, it must run the same risks, including the possibility of an award of costs, that must be run by an ordinary party should that defense fail. Compare 2A Moore's Federal Practice ¶ 12.13.

It is for this reason that the federal courts have traditionally awarded costs against a state, directly or through its officials, when the state becomes involved in litigation in a federal court in its own name or on behalf of its officials. Since the Judiciary Act of 1789[2] the federal courts have been expressly empowered to award costs. Provisions authorizing, and at times requiring, the award of costs and expenses are to be found throughout the Federal Rules of Civil Procedure,[3] the Federal Rules of Criminal Procedure,[4] the Federal Rules of Appellate Procedure,[5] the Rules of the Supreme Court,[6] and the United States Code.[7] These rules and statutes are literally applicable to all federal litigation, regardless of the identity of the parties, and have been uniformly applied even where the party liable

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[2] 1 Stat. 73, 93; *Henkel* v. *Chicago, etc., R.R.*, 284 U.S. 444 (1932).

[3] Federal Rules of Civil Procedure, Rules 30(g), 37(a)(4), 41(d), 43(f), 54, 55(b)(1), 56(g), 65(c), 68.

[4] Federal Rules of Criminal Procedure, Rule 38(a)(3).

[5] Federal Rules of Appellate Procedure, Rules 7, 38, 39.

[6] Rules of the Supreme Court, Rules 14, 18, 36(3), 57, 60.

[7] See e.g. 28 U.S.C. §§ 1331, 1332, 1446, 1911-29, 2101(f), 2103.

for costs is a state or a state official. The Clerk of this Court taxes costs against a losing party without regard to the official status of that party. Costs are routinely awarded by this Court against (a) state officials who are the defendants in federal civil actions for injunctive relief, (b) state officials who are the defendants in federal habeas corpus actions, (c) state agencies which are the defendants in civil actions originating in state court, and (d) states in criminal prosecutions originating in state courts. A list of the cases in which such awards were made in October Terms 1970-74 is set out in the Appendix to this brief.

The state in this case does not appear to deny that, as a general matter, the federal courts may award costs against states and state officials. Such awards are the normal incident of a successful action for declaratory or injunctive relief, and their "ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex Parte Young*." *Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974). Were this Court to hold such awards impermissible under the Eleventh Amendment, it would be required to rule unconstitutional, insofar as they apply to states or state officials, every federal court rule and every provision of the United States Code authorizing awards of costs.

The state officials maintain, however, that counsel fees cannot be included among the awardable costs. There is, we believe, no basis for distinguishing counsel fees from other items of costs, such as transcripts, printing expenses, filing or docketing fees, or the expenses of witnesses, experts or interpreters. Awards of counsel fees, where proper, have long been regarded as a part of costs. The earliest authority for such awards in England was contained in a statute adopted in 1278 providing for taxation of "costs

of his writ purchased." [8] The first congressional enactment regulating the award of counsel fees treated them as an item of taxable costs. 10 Stat. 161 (1853); see 28 U.S.C. § 1923(a). In recent years Congress has adopted more than a score of statutes authorizing awards of attorneys' fees; in virtually every case that award was made an item to be included as part of the taxable costs.[9] This Court has

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[8] Statute of Gloucester, 1278, 6 Edw. 1, c 1; *Fleischman Distilling Corp.* v. *Maier Brewing Co.*, 388 U.S. 714, 717, n. 7 (1967).

[9] See e.g. 5 U.S.C. § 552(a) (court may assess "attorneys' fees and other litigation costs"); 7 U.S.C. § 210(f) (successful petitioner to be allowed "a reasonable attorney's fee to be taxed and collected as part of the costs of the suit"); 7 U.S.C. § 499g (b) (successful petitioner to be allowed "a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit"); 15 U.S.C. § 15 (plaintiff in antitrust action to recover "the cost of suit, including a reasonable attorney's fee"); 15 U.S.C. § 72 (person injured by illegal importation to recover "the cost of the suit, including a reasonable attorney's fee"); 15 U.S.C. § 77k(e) (court may award to prevailing party "the costs of such suit, including reasonable attorney's fee"); 15 U.S.C. § 78i(e) (court in securities case may "assess reasonable costs, including reasonable attorneys' fees"); 15 U.S.C. § 78r(a) (court may "assess reasonable costs, including reasonable attorneys' fees"); 17 U.S.C. § 116 (court in patent action may award "a reasonable attorney's fee as part of the costs"); 18 U.S.C. § 1964(c) (person injured by racketeering may sue and recover "the cost of the suit, including a reasonable attorney's fee"); 20 U.S.C. § 1617 (court in school desegregation case may allow "a reasonable attorney's fee as part of the costs"); 33 U.S.C. § 1365(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 33 U.S.C. § 1415(g)(4) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 42 U.S.C. § 1857h-2(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 42 U.S.C. § 2000a-3(b) (court in public accommodations case may allow "a reasonable attorney's fee as part of the costs"); 42 U.S.C. § 2000e-5(k) (court in employment discrimination case may allow "a reasonable attorney's fee as part of the costs"); 42 U.S.C. § 4911(d) (court may award "costs of litigation (including reasonable attorney and expert witness fees)"); 45 U.S.C. § 153(p) (court in Railway Labor Act case must allow prevailing employee "a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit"); 46 U.S.C. § 1227 (successful

also recognized a variety of circumstances in which counsel fees can be awarded without express statutory authority, but these awards too have been treated as "a matter of costs." *Trustees* v. *Greenough,* 105 U.S. 527 (1882).

The limitation of the Eleventh Amendment clearly does not extend to an award of costs, and any item may constitutionally be included in the costs taxed which is in fact an expense of the litigation. To say that all actual expenses may constitutionally be made part of costs is not, of course, to suggest that Congress or the courts are obligated to make such awards. Under the applicable federal rules and statutes some such expenses are taxable and others are not; Congress "has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some but not others." *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 44 L.Ed. 2d 141, 157 (1975). But counsel fees, like printing, transcripts or filing costs, are unquestionably an incidental expense of the litigation; when Congress, or the courts exercising traditional equity powers, authorize or order awards for such expenses, the Eleventh Amendment does not afford to the states any protection from the responsibilities of ordinary litigants to comply with such awards.

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plaintiff to recover "the cost of suit, including a reasonable attorney's fee"); 47 U.S.C. § 206 (court to award "reasonable counsel or attorney's fee" which "shall be taxed and collected as part of the costs in the case"); 49 U.S.C. § 8 (court to award "reasonable counsel or attorney's fee" which "shall be taxed and collected as part of the costs of the case"); 49 U.S.C. § 16(2) (court to award "reasonable attorney's fee, to be taxed and collected as part of the costs of the suit"); 49 U.S.C. § 908(b) (court to award "a reasonable counsel or attorney's fee" which "shall be taxed and collected as part of the costs in the case.")

CONCLUSION

For these reasons the judgment of the court of appeals in No. 75-283, should be affirmed.

Respectfully submitted,

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APPENDIX

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This Appendix sets forth cases in which the Clerk of the Supreme Court has awarded costs against a state, or a state official, during October Terms, 1970-74. With regard to awards against state officials, the list is limited to actions for injunctive relief against the defendant in his official capacity, in which the action was defended by the state and where, as a consequence, there was no suggestion that the costs would be paid by the defendant personally. Costs have also been awarded in damage actions against state officials, e.g. *Schever* v. *Rhodes,* No. 72-914; these cases, however, are not included, since, although the costs are in fact usually paid by the state, the defendant officials were personally liable.

(a) Civil actions for injunctive relief against state officials, originating in federal court, in which costs were awarded to the plaintiff:

Connor v. *Waller,* No. 74-1509 (Defendant was the Governor of Mississippi);

Meek v. *Pittinger,* No. 73-1765 (Defendants were the Secretary of State and Treasurer of Pennsylvania);

Chapman v. *Meier,* No. 73-1406 (Defendant was the Secretary of State of North Dakota);

Hagans v. *Levine,* No. 72-6476 (Defendant was the Commissioner of the New York State Department of Social Services);

Communist Party of Arizona v. *Whitcomb,* No. 72-1040 (Defendant was the Secretary of State of Indiana and the members of the Indiana State Election Board);

Christian v. *New York Department of Labor*, No. 72-5704 (Defendants included officials of the New York Department of Labor);

Committee for Public Education v. *Nyquist*, No. 72-694 (Defendant was the New York Commissioner of Education);

Norwood v. *Harrison*, No. 72-77 (Defendants were the members of the Mississippi State Textbook Purchasing Board);

Papish v. *Board of Curators of University of Mississippi*, No. 72-794 (Defendants were officials of the state university);

Healy v. *James*, No. 71452 (Defendant was the President of Central Connecticut State College);

Fuentes v. *Shevin*, No. 70-5039 (Defendant was the Attorney General of Florida);

Taylor v. *McKeithen*, No. 71-784 (Defendant was the Governor of Louisiana);

Townsend v. *Swank*, No. 70-5021 (Defendant was the Director of the Illinois Department of Public Aid).

(b) Civil Actions for injunctive or monetary relief, against a state or state official, originating in state court, in which costs were awarded to the plaintiff:

Austin v. *New Hampshire*, No. 73-2060;

Mescalero Apache Tribe v. *Jones*, No. 71-738;

McClanahan v. *Arizona State Tax Commission*, No. 71-834;

Evco v. *Jones*, No. 71-857;

Matz v. *Arnet*, No. 71-1182;

Bonnelli Cattle Corp. v. *Arizona*, No. 72-397.

(c) Habeas corpus actions against state officials, originating in federal court, in which costs were awarded to the petitioner:

Francisco v. *Gathright*, No. 73-5768;

Robinson v. *Neil*, No. 71-6272;

Peters v. *Kiff*, No. 71-5078;

Loper v. *Beto*, No. 70-5388;

Humphrey v. *Kady*, No. 70-5004;

Morrissey v. *Brewer*, No. 71-5103.

(d) Criminal prosecutions arising in state court in which costs were awarded to the defendant:

Brown v. *Illinois*, No. 73-6650;

Faretta v. *California*, No. 5772;

Herring v. *New York*, No. 73-6587;

Bigelow v. *Virginia*, No. 73-1309;

Drepe v. *Missouri*, No. 73-6038;

Antoine v. *Washington*, No. 73-717;

Taylor v. *Louisiana*, No. 75-5744;

Jenkins v. *Georgia*, No. 73-557;

Spence v. *Washington*, No. 72-1690;

Codispoti v. *Pennsylvania*, No. 73-5615;

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Davis v. *Alaska*, No. 72-5794;

Alexander v. *Virginia*, No. 71-1315;

Roaden v. *Kentucky*, No. 71-1134;

Chambers v. *Mississippi*, No. 71-5908;

Furman v. *Georgia*, No. 69-5003;

Jackson v. *Georgia*, No. 69-5030;

Branch v. *Texas*, No. 69-5031;

Turner v. *Arkansas*, No. 71-1309;

Brooks v. *Tennessee*, No. 71-5313;

Jackson v. *Indiana*, No. 70-5009;

Columbo v. *New York*, No. 71-352;

Smith v. *Florida*, No. 70-5055;

Rabe v. *Washington*, No. 71-247;

Alexander v. *Louisiana*, No. 70-5026;

Stanley v. *Illinois*, No. 70-5014;

Camp v. *Arkansas*, No. 70-353;

Santebello v. *New York*, No. 70-98.